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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION
12

13 **MINDS, INC., ET AL,**

14 Plaintiffs,

15 v.

16 **ROBERT BONTA,**

17 Defendant.
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2:23-cv-02705- RGK-MAAx

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS**

Date: June 19, 2023
Time: 9:00 a.m.
Courtroom: 10B
Judge: The Honorable R. Gary
Klausner
Trial Date: None set
Action Filed: April 13, 2023

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INTRODUCTION

Plaintiffs challenge Assembly Bill 587, a straightforward disclosure statute that requires social media companies with annual gross revenues of at least \$100 million to publicly disclose information about their content-moderation policies and decisions, i.e., whether and how they take action against content and users that violate their terms of service. The statute is intended to provide transparency to California consumers. Notwithstanding Plaintiffs' hyperbole, the statute does not dictate either the substantive content of any platform's terms of service or the manner in which those terms must be enforced. The case should be dismissed without leave to amend.

Preliminarily, Plaintiffs' Complaint fails to allege a case or controversy under Article III of the Constitution. None of the Plaintiffs is even required to make disclosures under the statute. Their only claims of harm are based on speculative and conclusory allegations about the bill's downstream effects on other social media platforms and users who are not subject to its requirements. Plaintiffs lack standing and their claims are not ripe.

On the merits, Plaintiffs fail to state any claim as a matter of law. Plaintiffs' First Amendment challenge fails because the statute simply requires that social media companies make purely factual disclosures about their terms of service, a requirement that is constitutionally permissible under longstanding Supreme Court and Ninth Circuit jurisprudence. Although Plaintiffs claim that AB 587 will make it more likely that social media platforms will "censor" their posts, the Ninth Circuit has made clear that social media platforms are private actors, and that, absent exceptional circumstances not alleged here, the State cannot be held responsible for their content-moderation decisions.

Plaintiffs' constitutional overbreadth and vagueness claims fail as a matter of law for the same reasons. AB 587 does not regulate what users may say on social media, or what social media platforms can or must do to moderate content that they

1 deem harmful or otherwise inappropriate under their own policies. It simply
 2 requires social media companies to provide greater transparency about their
 3 content-moderation rules and the steps they take to enforce those rules.

4 Given the failure of Plaintiffs' federal claims, this Court need not exercise
 5 supplemental jurisdiction over Plaintiffs' claim under the California Constitution's
 6 equivalent to the First Amendment. Regardless, that claim is squarely barred by the
 7 Eleventh Amendment, which prohibits federal suits against state officials based on
 8 alleged violations of state law, and it would fail for the same reasons that Plaintiffs'
 9 First Amendment claim fails.

10 The defects in Plaintiffs' Complaint cannot be cured. The Court should
 11 dismiss the Complaint without leave to amend.

12 **BACKGROUND**

13 **I. ASSEMBLY BILL 587**

14 Social media platforms, such as Twitter, have terms of service, including
 15 content-moderation rules, to which individuals must agree as a condition of using
 16 the platform. *See, e.g., O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1172, *aff'd*
 17 *sub. nom. O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023). These rules give the
 18 platform the right to take action against content or users that violate the rules. *Id.* at
 19 1186. In recent years, content-moderation by social media companies has drawn
 20 public concern, with numerous lawsuits filed by users whose accounts were limited
 21 or suspended for posting content that violated the platforms' rules. *See, e.g.,*
 22 *Informed Consent Action Network v. YouTube, Inc.*, 582 F. Supp. 3d (N.D. Cal.
 23 2022); *Yuksel v. Twitter, Inc.*, No. 22-cv-05415-TSH, 2022 WL 16748612 (N.D.
 24 Cal. Nov. 7, 2022); *King v. Facebook, Inc.*, 572 F. Supp. 3d 776 (N.D. Cal. 2021);
 25 *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360 (Cal. Ct. App. 2021). Some states
 26 have passed laws prohibiting social media platforms from moderating, restricting,
 27 or otherwise limiting particular kinds of content. *NetChoice, LLC v. Att'y Gen.*, 34
 28 F.4th 1196, 1205-1206 (11th Cir. 2022) (describing Florida statute); *NetChoice*,

1 *LLC v. Paxton*, 49 F.4th 439, 445-446 (5th Cir. 2022) (describing Texas statute). In
 2 marked contrast, California’s recently passed Assembly Bill 587 (2022 Cal. Stats.,
 3 ch. 269) (“A.B. 587”) does not regulate content-moderation policies or decision-
 4 making by private social media platforms. It is simply a disclosure statute.

5 Codified at California Business and Professions Codes sections 22675-22681,¹
 6 AB 587 provides that, commencing January 1, 2024, social media companies, as
 7 defined in the statute,² must post the terms of service for each social media platform
 8 owned or operated by the company “in a manner reasonably designed to inform all
 9 users of the social media platform of the existence and contents of the terms of
 10 service.” § 22676(a). The posted terms of service must contain a “description of
 11 the process users must follow to flag content, groups, or other users that they
 12 believe violate the terms of service,” “the social media company’s commitments on
 13 response and resolution time,” and a “list of potential actions the social media
 14 company may take against an item of content or a user....” § 22676(b).

15 The social media companies also must, commencing January 1, 2024, submit
 16 to the Attorney General a semi-annual “terms of service report” containing specific
 17 factual information. § 22677(a)-(b). The reports must include the “current version
 18 of the platform’s terms of service” and a “detailed description of content
 19 moderation practices used by the social media company” § 22677(a)(1), (a)(4).
 20 The reports must also include a statement of “whether the current version of the
 21 terms of service define each of the following categories of content, and, if so, the
 22 definitions of those categories,” and “any existing policies intended to address the
 23 categories,” which are: “[h]ate speech or racism”; “[e]xtremism or radicalization”;
 24 “[d]isinformation or misinformation”; “[h]arassment”; and “[f]oreign political

25 ¹ All statutory citations are to the California Business and Professions Code,
 26 unless otherwise indicated.

27 ² AB 587 defines “social media company” as a person or entity that owns or
 28 operates one or more “social media platforms.” § 22675(d). A “social media
 platform” is defined as a “public or semi-public internet-based service that has
 users in California and meets” specific criteria. § 22675(e).

1 interference.” § 22677(a)(3), (a)(4)(A). Finally, the reports must include
2 “information on content that was flagged by the social media company as content
3 belonging to any of the categories,” including the number of items of content that
4 were “flagged” or “actioned” by the social media company, and how those items of
5 content were “flagged” or “actioned,” e.g., whether by company employees,
6 artificial intelligence software, or users. § 22676(a)(5), (a)(5)(B)(iv)-(v). The
7 Attorney General is directed to compile all terms of service reports and make them
8 available to the public in a “searchable repository on its official internet website.”
9 § 22676(c).

10 Exempt from the statute are social media companies with annual gross
11 revenues of less than \$100 million. § 22680. Also exempt are platforms “for
12 which interactions between users are limited to direct messages, commercial
13 transactions, consumer reviews of products, sellers, services, events, or places, or
14 any combination thereof.” § 22681.

15 Nothing in AB 587 requires social media companies to disclose the identities
16 of or information about specific users. *See* §§ 22675-81. Nothing in AB 587
17 dictates the substantive content of social media companies’ terms of service. *See*
18 §§ 22675-81. Nothing in AB 587 requires that social media companies take, or
19 prohibits them from taking, any action whatsoever against any item of content or
20 user. *See* §§ 22675-81. And nothing in AB 587 requires that social media
21 companies’ terms of service define any categories of content. *See id.*

22 An Assembly Judiciary Committee Report explained the bill’s purposes as
23 follows:

24 In essence, AB 587 is a transparency measure. It would require social
25 media companies to post their “terms of service,” especially as to the
26 kinds of online behavior and activities they permit and, conversely, what
27 kinds of behavior and activities subject a user to a temporary or
28 permanent prohibition from using the social media service. Presumably,

1 requiring these postings will serve three purposes. First, it will let users
 2 know what social media platforms do to flag and remove certain kinds of
 3 content, which may affect what sites users prefer to use. Second, it lets
 4 users know in advance what kind of content or conduct could lead to
 5 their being temporarily or permanently banned from using the social
 6 media service. Third, if social media companies are forced to disclose
 7 what they do in this regard, it may pressure them to become better
 8 corporate citizens by doing more to eliminate hate speech and
 9 disinformation.

10 Cal. Assemb. Comm. on Judiciary Report, 2021-22 Sess. (A.B. 587), Apr. 27,
 11 2022, Request for Judicial Notice filed herewith (“RJN”) Exh. 1, Docket entry 15-
 12 3.

13 **II. THE ALLEGATIONS OF THE COMPLAINT**

14 Plaintiff Minds, Inc. (“Minds”) allegedly operates a social networking service.
 15 Complaint ¶ 10. The service can be accessed through Minds’ own website or “as
 16 an app for Android and iPhone.” *Id.* While Minds has content-moderation rules
 17 that ban, *inter alia*, “revenge porn,” “doxxing,” and “malware,” it does not “have
 18 any regulation of the eight [sic] categories of speech identified in AB 587.” *Id.*
 19 ¶ 86. Minds has less than \$100 million in annual revenue, *id.* ¶ 88, and thus is
 20 exempt from AB 587’s requirements.

21 Plaintiff Tim Pool (“Pool”) is a “social media content creator” with millions of
 22 followers on various platforms. Complaint ¶ 11. Pool has been “frequently
 23 accuse[d] of creating ‘hate speech,’ ‘disinformation,’ and ‘extremism’—labels he
 24 strongly rejects—often with the explicit intention of pressuring social networks to
 25 deplatform him.” *Id.* ¶¶ 11, 95.

26 Plaintiff The Babylon Bee LLC (“The Bee”) publishes satirical news articles
 27 on its website, which it also posts to Twitter, Facebook, Instagram, and YouTube.
 28 *Id.* ¶ 12. Its satire has been criticized for “draw[ing] on and reinforce[ing]

misinformation and conspiracy,” and for trafficking in “hate speech, misinformation, and disinformation.” *Id.* ¶¶ 12, 96. In 2022, Twitter suspended The Bee for violating Twitter’s hateful conduct policy; the account was restored after Elon Musk purchased Twitter. *Id.* ¶ 96.

Shorn of hyperbole, the claims alleged in the Complaint are as follows:

A. Count I: Violation of the First Amendment

The Complaint alleges that AB 587 was “written with the express intent to discourage expression of constitutionally protected viewpoints which may be subjectively deemed as ‘hate speech,’ ‘racism,’ ‘extremism,’ and ‘misinformation,’ and disinformation.” Complaint ¶ 101. AB 587 allegedly makes it “more likely” that Plaintiffs Pool and Bee will “have their content moderated and censored based on viewpoint.” *Id.* ¶ 108. And it allegedly imposes on Plaintiff Minds “an artificial ceiling on its ability to grow its social network and raise capital all while the law casts the platform, which is committed to free speech, as an outlier in the social media industry.” *Id.* ¶ 109. The Complaint further alleges that AB 587 “threatens the anonymity of users which threatens their ability to speak and interact with plaintiffs.” *Id.* ¶ 107.

B. Count II: Unconstitutional Overbreadth

The Complaint alleges that AB 587 is overbroad because it “regulates ‘hate speech,’ ‘racism,’ ‘extremism,’ and ‘misinformation,’ and ‘disinformation,’” and thus “extends to a variety of legal, constitutionally protected speech.” *Id.* ¶¶ 112-113. Further, “its unconstitutional applications outweigh the limited number of applications to cases of speech which fall outside the scope of the First Amendment.” *Id.* ¶ 114.

C. Count III: Unconstitutional Vagueness

The Complaint alleges that AB 587 is unconstitutionally vague because it “includes numerous broad, vague and ambiguous terms,” such as “‘hate speech,’ ‘racism,’ ‘extremism,’ ‘radicalization,’ ‘disinformation,’ ‘misinformation,’ and

1 ‘foreign political interference,’” and “contains no explicit standards for what any of
2 these terms mean.” *Id.* ¶¶ 118, 119.

3
4 **D. Count IV: Violation of California Constitution, Article I,
Section 2.**

5 Finally, the Complaint alleges that AB 587 violates Plaintiffs’ right to free
6 speech under the California Constitution’s free speech equivalent to the First
7 Amendment (Cal. Const., art. I, § 2). Complaint ¶¶ 123-127.

8 **LEGAL STANDARD**

9 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss
10 a complaint on the basis that there is no subject matter jurisdiction. In such
11 situations, the party asserting jurisdiction has the burden of proving it exists. *Perry*
12 *v. Newsom*, 18 F.4th 622, 630 (9th Cir. 2021).

13 A complaint may also be dismissed for failure to state a claim upon which
14 relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal is proper where there is
15 no cognizable legal theory or there are insufficient facts alleged to support a
16 cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To
17 defeat a Rule 12(b)(6) motion, a plaintiff must allege facts sufficient to “raise a
18 right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550
19 U.S. 544, 555 (2007). A court must assume the plaintiff’s allegations of fact are
20 true and draw all reasonable inferences in the plaintiff’s favor. *See Daniels-Hall v.*
21 *Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). However, the court is not
22 required to “accept as true allegations that are unwarranted deductions of fact or
23 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th
24 Cir. 2008). And “[t]he tenet that a court must accept as true all of the allegations
25 contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*,
26 556 U.S. 662, 678 (2009). “A pleading that offers ‘labels and conclusions’ or a
27 ‘formulaic recitation of the elements of a cause of action’” cannot survive a motion
28 to dismiss. *Id.*

1 Leave to amend need not be granted if “it is clear that the complaint could not
2 be saved by an amendment.” *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*,
3 416 F.3d 940, 946 (9th Cir. 2005).

4 **ARGUMENT**

5 **I. PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE.**

6 The Complaint fails to allege a case or controversy under Article III of the
7 Constitution. To establish standing, Plaintiffs must allege: (1) they suffered an
8 “injury in fact,” which is an “actual or imminent” invasion of a legally protected
9 interest that is “concrete and particularized”; (2) the injury must be “fairly
10 traceable” to the challenged conduct of the defendant; and (3) it must be likely that
11 the [plaintiffs’] injury will be redressed by a favorable judicial decision.” *Italian*
12 *Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) (citations omitted).
13 Plaintiffs must “face a realistic danger of sustaining a direct injury as a result of
14 [defendant’s] alleged illegal action.” *Thomas v. Anchorage Equal Rights Comm’n*,
15 220 F.3d 1354, 1139 (9th Cir. 2000). Where an allegation of injury is conjectural
16 or hypothetical and not clean-cut and concrete, concepts of standing and ripeness
17 overlap. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010). *See Texas v.*
18 *United States*, 523 U.S. 296, 300 (1998); *Thomas v. Anchorage Equal Rights*
19 *Comm’n*, 220 F.3d at 1138. “A claim is not ripe for adjudication if it rests upon
20 contingent future events that may not occur as anticipated, or indeed may not occur
21 at all.” *Texas v. United States*, 523 U.S. at 300; *Thomas v. Anchorage Equal Rights*
22 *Comm’n*, 220 F.3d at 1138.

23 Here, Plaintiffs do not allege that they are even subject to the disclosure
24 requirements of AB 587, and they patently are not. Of the three, only Minds is
25 alleged to operate a social media platform, but it admits that it does not have \$100
26 million in annual revenue; therefore, it is exempt from AB 587’s requirements.
27 Complaint ¶¶ 88, 109; *see* § 22680. Although Minds hopes to “grow its business”
28

1 and one day reach that threshold, Complaint ¶ 88, that allegation satisfies neither
2 standing nor ripeness.

3 The Complaint also does not plausibly allege any injury-in-fact caused by AB
4 587's regulation of covered social media companies. Instead, it rests on farfetched
5 allegations about the downstream effects of AB 587. With respect to Plaintiffs Pool
6 and The Bee, it alleges that "the law will cause social media companies to censor"
7 them (Complaint ¶¶ 94, 97), without citing any provision in the law that actually
8 does that. Nothing in AB 587 tells social media companies what, if any, content-
9 moderation actions they must take, or requires them to "censor" anyone. *Cf.*
10 *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1203-05 (challenging Florida statute's
11 content-moderation restrictions on private social media platforms).

12 In similar fashion, the Complaint alleges that by regulating large social media
13 companies, the law will set "industry standards" and thereby ensure that Minds and
14 other "less moderated platforms" will be viewed as "outliers" and "pariahs." *Id.*
15 ¶¶ 70, 7; *id.* ¶ 94 (alleging that AB 587 "creates an environment where Minds' lack
16 of content moderation policies put it at odds with the state-mandated industry
17 standards created by the law"). This, in turn, will allegedly "limit the company's
18 growth" and at the same time prevent it from "being the target of any strategic
19 acquirer with \$100 million or more in annual revenues" *Id.* ¶ 88. Again, this
20 rests on a blatant misreading of AB 587, which does not dictate the terms of any
21 company's content-moderation policy, and does not require any platform to take
22 any particular action with respect to any content or user. It also rests on pure
23 speculation about future events in the marketplace, and the actions of a host of
24 third-parties that may or may not behave the way Plaintiffs predict, and for reasons
25 that have nothing to do with AB 587. *See* Complaint ¶ 77 (alleging that AB 587
26 will make it "more likely that advertisers and app store platforms will not do
27 business with Minds".) Indeed, the Complaint alleges that Google and Apple
28 *already* require social media apps used on iPhone and Android phones to have

1 content-moderation rules and procedures, and that Google and Apple have “banned,
 2 suspended, or not approved social media apps for insufficient levels of content
 3 moderation for ‘hate speech’ and ‘disinformation.’” *Id.* at ¶¶ 78-83. It is apparent
 4 that Plaintiffs’ real complaint is that other persons and entities have their own free
 5 speech rights and have exercised them to criticize Plaintiffs and others for
 6 spreading COVID disinformation, racist commentary, and hate speech, and to
 7 advocate that they be banned or “deplatformed,” none of which activities were
 8 triggered by AB 587, which has yet to even go into effect. *Id.*; *see also id.* ¶¶ 85-98.

9 Social media platforms are statutorily exempt from liability for “any action
 10 voluntarily taken in good faith to restrict access to or availability of material that
 11 the provider or user considers to be obscene, lewd, lascivious, filthy, excessively
 12 violent, harassing, or otherwise objectionable, whether or not such material is
 13 constitutionally protected.” 47 U.S.C. § 230(c)(2)(A). The fact that Apple, Google,
 14 or others may (or may not) choose to take action against Plaintiffs does not give
 15 Plaintiffs standing to challenge AB 587, which does not impose any obligations on
 16 social media platforms to restrict access. Plaintiffs’ speculation that at some future
 17 date a social media platform, encouraged somehow by AB 587, may take action
 18 against them falls far short of establishing Article III jurisdiction.

19 **II. PLAINTIFFS’ FIRST AMENDMENT CLAIM FAILS.**

20 As explained, AB 587 does not dictate content-moderation policies or
 21 decisions about any particular content or user on social media. It merely requires
 22 covered social media companies to post their content-moderation policies and
 23 procedures so users can see them, and to report information about their content-
 24 moderation policies and decisions to the Attorney General on a semi-annual basis,
 25 so he can compile that information and make it available on his official website,
 26 enabling consumers to compare different platforms. Thus, AB 587 does nothing to
 27 convert private content-moderation decisions into state action, and Plaintiffs do not
 28 and could not allege otherwise. *See infra* Section III. Rather, AB 587 is in the same

1 mold as other consumer disclosure statutes, such as food labeling and truth-in-
 2 lending laws. To the extent it regulates speech by covered social media companies,
 3 it involves compelled commercial speech of purely factual and uncontroversial
 4 information, consistent with the First Amendment.

5 The standard for compelled disclosures in the context of commercial speech is
 6 the test established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626
 7 (1985). “Under *Zauderer*, compelled disclosure of commercial speech complies
 8 with the First Amendment if the disclosure is reasonably related to a substantial
 9 governmental interest and is purely factual and uncontroversial.” *CTIA – Wireless*
 10 *Assn. v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019) (“*CTIA*”). *Zauderer*
 11 and its progeny reflect the unexceptional principle that “[t]he First Amendment
 12 does not generally protect corporations from being required to tell prospective
 13 customers the truth.” *Nationwide Biweekly Admin. v. Owen*, 873 F.3d 716, 721 (9th
 14 Cir. 2017).

15 **A. The Disclosures Required by AB 587 Are Factual and**
 16 **Uncontroversial.**

17 Starting with the first part of the *Zauderer* test, the Ninth Circuit has explained
 18 that the factual and uncontroversial requirement is satisfied where the law in
 19 question does not “attempt[] to ‘prescribe what shall be orthodox in politics,
 20 nationalism, religion or other matters of opinion, or force citizens to confess by
 21 word or act their faith therein.’” *Env’tl. Defense Ctr. v. U.S. E.P.A.*, 344 F.3d 832,
 22 849 (9th Cir. 2003). “Uncontroversial” refers to the “factual accuracy of the
 23 compelled disclosure, not to its subjective impact on the audience.” *CTIA*, 854
 24 F.3d at 1117. *See, e.g., Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229,
 25 251 (2010) (upholding law requiring that certain bankruptcy lawyers disclose
 26 themselves as “debt relief agencies,” despite law firm’s argument that the term was
 27 “confusing and misleading”); *Nat’l Biweekly Admin. v. Owen*, 873 F.3d at 733
 28 (upholding requirement that mortgage refinancing company disclose that its

solicitations were not authorized by the lender); *CTIA*, 928 F.3d at 846-47 (upholding ordinance requiring cell phone retailers to disclose that cell phone use could cause exposure to “RF radiation” in excess of federal safety guidelines, notwithstanding argument that term was “fraught with negative associations”).

Here, although the Complaint is littered with conclusory allegations that AB 587 is “viewpoint discriminatory,” *see* Complaint ¶¶ 6-8, 77, 99, 101, 103, it fails to identify any provision of the law that requires any disclosure that is not purely factual. AB 587 simply requires that social media companies post their terms of service and specific factual information about those terms of service, § 22676(a), and provide semi-annual reports to the Attorney General that include their current terms of service (§ 22677(a)(1)), as well as related statistical information on “content that was flagged by the social media company as content belonging to any of the categories described in [§ 22677(a)(3)].” § 22678.

AB 587 only requires social media companies to state “*whether* the current version of the terms of service defines each of the following categories of content, and, *if so*, the definitions of those categories, including *any* subcategories.” § 22677(a)(3) (italics added). Thus, if a social media company’s terms of service do not use the categories listed in AB 587, its report to the Attorney General would simply disclose that fact. Likewise, if a social media company does not moderate—or “flag”—content meeting its own definitions of “hate speech,” “misinformation,” or the other categories listed in AB 587, it would have no numerical data on that subject to include its report. *See id.* All of the disclosure requirements are purely factual and noncontroversial.

B. AB 587 Is Reasonably Related to a Substantial State Interest.

AB 587 also meets the second part of the *Zauderer* test, because it is “reasonably related to a substantial governmental interest.” *CTIA*, 928 F.3d at 845. California clearly has a substantial interest in requiring social media companies to be transparent about their content-moderation policies and decisions, so consumers

1 can make informed decisions. *E.g., Am. Hosp. Ass’n v. Azar*, 983 F.3d 528, 540-41
 2 (D.C. Cir. 2020) (upholding statute requiring hospitals to disclose pricing
 3 information, “to achieve goal of informing consumers about a particular product
 4 trait”) (quoting *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 26 (D.C. Cir.
 5 2014) (en banc); *Nat’l Elec. Mfrs. Assn. v. Sorrell*, 272 F.3d 104, 115 (2d Cir.
 6 2011) (rejecting challenge to regulation requiring disclosure of information
 7 concerning mercury-containing products “to better inform consumers about the
 8 products they purchase”).

9 As explained above, the purposes of AB 587 include letting users know
 10 “what social media platforms do to flag and remove certain kinds of content,
 11 which may affect what sites users prefer to use,” and “what kind of content or
 12 conduct could lead to their being temporarily or permanently banned from
 13 using the social media service.” *See* RJN, Exh. 1, Docket entry 15-3. AB 587
 14 directly advances these substantial state interests. Indeed, courts looking at
 15 similar disclosure requirements in the social media space have expressed no
 16 concern about their constitutionality. In addition to content-moderation
 17 restrictions, the statute at issue in *NetChoice, LLC v. Att’y Gen.*, 34 F.4th at
 18 1230, contains provisions requiring that social media platforms “publish the
 19 standards, including detailed definitions, it uses or has used for determining
 20 how to censor, deplatform, and shadow ban,” and that they inform users about
 21 changes to their terms of service before implementing them. *Id.* On an appeal
 22 from an order granting a preliminary injunction, the Eleventh Circuit held that
 23 the statute’s content-moderation restrictions were likely unconstitutional, but
 24 Florida’s interest in requiring social media platforms to publish their content-
 25 mediation standards was likely legitimate, because it ensures that “consumers
 26 who engage in commercial transactions with platforms by providing them with
 27 a user and data for advertising in exchange for access to a forum—are fully
 28 informed about the terms of that transaction and aren’t misled about

platforms’ content-moderation.” *Id.* Similarly, the Texas statute at issue in *NetChoice, LLC v. Paxton* contains provisions requiring large social media platforms to “publish an acceptable use policy and disclose information about the Platforms’ content management and business practices,” and publish a report containing high-level statistics about their content-moderation activities. 49 F.4th at 485. Despite the law’s other problems, there was no dispute that its disclosure requirements “advance the state’s interest in enabling users to make an informed choice regarding whether to use the Platforms.” 49 F.4th at 485 (cleaned up). Here, AB 587 provides similar transparency and is constitutional.

As explained, the Legislature also considered that, by requiring greater transparency about platforms’ content-moderation rules and decisions, AB 587 may encourage—*though not require*—social media companies to “become better corporate citizens by doing more to eliminate hate speech and disinformation” on their platforms. RJN, Exh. 1, Docket entry 15-3. This, too, is a substantial state interest.³ Although Plaintiffs contend the Legislature’s “true” purpose was to

³ The Legislature was concerned that “social media has become a powerful and largely unregulated platform for groups espousing hate, violence, bigotry, conspiracy theories and misinformation.” RJN, Exh. 1, Docket entry 15-3. Use of social media has ballooned from only five percent of adults in 2005 to over 70 percent of adults in 2022. A.B. 587 S. Judiciary Comm. Report, 2021-22 Sess. (June 23, 2022), RJN, Exh. 2, Docket entry 15-4. During that time, social media companies’ content-moderation policies have dramatically evolved; at the same time, “proliferation of objectionable content and ‘fake news’ has led to calls for swifter and more aggressive action in response.” *Id.* The Legislative history notes that a recent study of Twitter posts determined that “more targeted, discriminatory tweets posted in a city related to a higher number of hate crimes.” A.B. 587 S. Rules Comm. Rep., 2021-22 Sess. (Aug. 11, 2022), RJN, Exh. 3, Docket entry 15-5; see A.B. 587 Assemb. Comm. on Judiciary Rep., 2021-22 Sess. (April 21, 2021), RJN, Exh. 4, Docket entry 15-6. The Legislature also was concerned that social media companies were deploying a number of methods of content moderation, but there was a lack of transparency into those methods. RJN, Exh. 2 at 11, Docket entry 15-4, and recognized “backlash against perceived censorship in response to filtering of content and alleged ‘shadow banning,’” RJN, Exh. 3 at 3, Docket entry 15-5. AB 587 was the Legislature’s response to these concerns.

1 squelch disfavored speech, and make it more likely that social media platforms will
 2 “censor” Plaintiffs and others, such speculation fails in the face of the plain text and
 3 the history of the bill, both of which make clear that the Legislature took pains to
 4 ensure that AB 587 “*does not require* social media companies to moderate or
 5 remove hateful or incendiary content.” *Id.* at 4 (emphasis added). Courts “assume
 6 that the objectives articulated by the legislature are actual purposes of the statute,
 7 unless an examination of the circumstances forces [the courts] to conclude that they
 8 could not have been a goal of the legislature.” *Am. Fuel & Petrochem. Mfrs. v.*
 9 *O’Keefe*, 903 F.3d 903, 912 (9th Cir. 2018). *Accord NetChoice, LLC v. Att’y Gen.*,
 10 34 F.4th at 1224 (holding that “when a statute is facially constitutional, a plaintiff
 11 cannot bring a free-speech challenge by claiming that the lawmakers who passed it
 12 acted with a constitutionally impermissible purpose,” and observing that in *United*
 13 *States v. O’Brien*, 391 U.S. 367, 384 (1968), the Supreme Court refused to void the
 14 statute at issue “on the basis of what fewer than a handful of Congressmen said
 15 about it” given that Congress “had the undoubted power to enact” it if legislators
 16 had only made “ ‘wiser’ speech[es] about it.”). Here, nothing alleged in the
 17 complaint overcomes that strong presumption.⁴

18 In sum, the “[m]andated disclosure of accurate, factual, commercial
 19 information does not offend the core First Amendment values of promoting
 20 efficient exchange of information or protecting individual liberty interests. Such
 21 disclosure furthers, rather than hinders, the First Amendment goal of the discovery

22 ⁴ In an attempt to demonstrate that AB 587’s “true” purpose is to suppress
 23 protected speech, the Complaint cites and mischaracterizes public comments made
 24 by the Governor and the Attorney General. Compare Complaint ¶¶ 17-21 with RJN
 25 Exhs. 5-6, docket entries 15-7, 15-8. These statements are not part of the bill’s
 26 legislative history. See *Am. Fuel & Petrochem. Mfrs. v. O’Keefe*, 903 F.3d at 912
 27 (holding that the district court correctly found that statements by public officials
 28 “do not demonstrate that objectives identified by the legislature were not the true
 goals” of the statute). Moreover, under California law, legislative history consists
 of materials relating to the bill that the legislature as a body had before it when
 deliberated over the bill. *Noori v. Countrywide Payroll & HR Solutions, Inc.*, 257
 Cal. Rptr. 3d 102, 110 n. 11 (Cal. Ct. App. 2019). The statements plaintiffs cite
 were not before the Legislature, and in fact post-date the Legislature’s vote. See
 RJN, Exhs. 5-6, Docket entries 15-7 - 15-8.

1 of truth and contributes to the efficiency of the ‘marketplace of ideas.’” *Nat’l Elec.*
 2 *Mfrs. Assn. v. Sorrell*, 272 F.3d at 113-114. AB 587 “furthers, rather than hinders,”
 3 that goal.

4 **C. The Complaint Fails to Allege Facts That Would Support a**
 5 **Finding That AB 587 Is Unduly Burdensome.**

6 A disclosure requirement could violate the First Amendment if it was so
 7 “unjustified or unduly burdensome” that it “chill[s] protected commercial speech.”
 8 *Zauderer*, 471 U.S. at 651. *See CTIA*, 928 F.3d at 848–49; *Am. Meat Inst. v. U.S.*
 9 *Dep’t of Agric.*, 760 F.3d at 27 (“*Zauderer* cannot justify a disclosure so
 10 burdensome that it essentially operates as a restriction on constitutionally protected
 11 speech”). Nothing in the statute or the Complaint suggests that the disclosure
 12 requirements of AB 587—which apply only to social media companies with \$100
 13 million in annual revenues and do not apply to any of the Plaintiffs—is unduly
 14 burdensome.

15 **III. PLAINTIFFS’ OVERBREADTH CLAIM FAILS.**

16 Plaintiffs’ overbreadth claim also fails as a matter of law. A statute may be
 17 unconstitutionally overbroad only where a plaintiff has shown that the “law is
 18 written so broadly that it may inhibit the constitutionally protected speech of a third
 19 party, even if his own speech may be prohibited.” *Foti v. City of Menlo Park*, 146
 20 F.3d 629, 635 (9th Cir. 1998). To prevail on a facial overbreadth challenge, a
 21 plaintiff must show that “a substantial number of [a law’s] applications are
 22 unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Knox*
 23 *v. Brovich*, 907 F.3d 1167, 1180 (9th Cir. 2018) (quoting *United States v. Stevens*,
 24 559 U.S. 460, 473 (2010)). Invalidation of a statute for First Amendment
 25 “overbreadth is ‘strong medicine’ that is not to be ‘casually employed.’” *United*
 26 *States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) (citation omitted).

27 Here, Plaintiffs’ overbreadth challenge rests on their misunderstanding of the
 28 statute, specifically, its contention that AB 587 “regulates ‘hate speech,’ ‘racism,’

1 ‘extremism,’ and ‘misinformation,’ and ‘disinformation,’” and thus “extends to a
 2 variety of legal, constitutionally protected speech.” *Id.* ¶ 112. As discussed above,
 3 AB 587 simply requires social media companies to publicly disclose information
 4 *about* their content-moderation policies and decisions; it does not regulate the
 5 *substance* of those policies and decisions. Nor does it regulate the speech of social
 6 media users, who are free to post any content they wish, subject to the platform’s
 7 *independent* content-moderation policies and decision-making.⁵ As made clear by
 8 case law in this circuit, social media companies are private actors with their own
 9 First Amendment rights, and their content-moderation decisions are not attributable
 10 to the State absent exceptional circumstances not alleged here. *See O’Handley v.*
 11 *Padilla*, 579 F. Supp. 3d at 1172 (“Like a newspaper or a news network, [social
 12 media platforms] make decisions about what content to include, exclude, moderate,
 13 filter, label, restrict, or promote, and those decisions are protected by the First
 14 Amendment.”); *O’Handley v. Weber*, 62 F.4th at 1156-618 (9th Cir. 2023) (holding
 15 that First Amendment claim based on alleged government influence on private actor
 16 requires that the government official “exercise coercive power or [have] provided
 17 such encouragement, either overt or covert, that the choice must be deemed in law
 18 to be that of the State” (citation omitted)).

19 **IV. PLAINTIFFS’ VAGUENESS CLAIM FAILS,**

20 The Complaint also fails to allege a cognizable claim that AB 587 is
 21 unconstitutionally vague. A challenge on vagueness will be upheld only if the

23 ⁵ Plaintiffs further suggest that the law is under-inclusive because it does not
 24 include child pornography in addition to the categories of content listed in section
 25 22677(a)(3). *See* Complaint ¶¶ 30-31. This, too, fails to state a claim. Child
 26 pornography is not speech under the First Amendment and is a crime under
 27 California and federal law. *See* Cal. Penal Code §§ 311-311.12; 18 U.S.C. § 2251.
 28 The appropriate response to child pornography on a social media platform is a
 criminal prosecution, not merely suspension of the sex offender’s social media
 account. Moreover, “the First Amendment imposes no freestanding
 ‘underinclusiveness limitation’” *French v. Jones*, 876 F.3d 1228, 1238 (9th
 Cir. 2017) (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015)).

1 enactment is impermissibly vague in all of its applications, or specifies “no
 2 standard of conduct . . . at all.” *Village of Hoffman Estates v. Flipside, Hoffman*
 3 *Estates, Inc.*, 455 U.S. 489, 494-495, 489 n. 7 (1982); *Boutilier v. Immigr. &*
 4 *Naturalization Serv.*, 387 U.S. 118, 121 (1967) (statute must be “so vague and
 5 indefinite as really to be no rule or standard at all”).

6 Plaintiffs’ claim fails because, as explained, AB 587 does not apply to
 7 Plaintiffs at all. *See O’Handley*, 62 F.4th at 1164 (upholding dismissal of vagueness
 8 challenge to statute that “was never applied” to the plaintiff). But even if Plaintiffs
 9 were subject to AB 587’s disclosure requirements, the claim would still fail.
 10 Plaintiffs allege that AB 587 is unconstitutionally vague because it “includes
 11 numerous broad, vague and ambiguous terms” such as “‘hate speech,’ ‘racism,’
 12 extremism,’ ‘radicalization,’ ‘disinformation,’ ‘misinformation,’ and ‘foreign
 13 political interference.’” *Id.* ¶ 118. But Plaintiff do not explain why those terms are
 14 either vague or indefinite. Moreover, Plaintiffs themselves plainly understand the
 15 terms, since they are able to allege that Minds’ content-moderation policy does *not*
 16 regulate these categories of content. *Id.* ¶ 86. More fundamentally, AB 587 does
 17 not require that social media companies moderate user content at all. And with
 18 respect to those terms in particular, AB 587 simply requires a covered social media
 19 company to include in its report to the Attorney General “[a] statement of *whether*
 20 the current version of the terms of service defines” each of those terms, and if so,
 21 include the definitions it is report. § 22677(a)(3) (*italics added*). Thus, the social
 22 media companies themselves decide how they choose to define those terms.
 23 Plaintiffs’ claim of unconstitutional vagueness fails as a matter of law.

24 **V. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE CALIFORNIA** 25 **CONSTITUTION.**

26 Because Plaintiffs’ federal claims all fail as a matter of law, the Court should
 27 decline to exercise supplemental jurisdiction over Plaintiffs’ state-law claim for
 28 violation of California’s version of the First Amendment. *See O’Handley v.*

1 *Padilla*, 579 F. Supp. 3d at 1185. Regardless, that claim, too, fails as a matter of
2 law.

3 **A. Plaintiffs’ State Law Claim Is Barred by the Eleventh
4 Amendment.**

5 First, Plaintiff’s claim under the California Constitution is squarely barred
6 under the Eleventh Amendment, which prohibits suits against a state in federal
7 court for all types of legal or equitable relief in the absence of consent by the state
8 or abrogation of that immunity by Congress. *Pennhurst State Sch. & Hosp. v.*
9 *Halderman*, 465 U.S. 89, 100 (1984) (citations omitted). “The Eleventh
10 Amendment [also] bars a suit against state officials when ‘the state is the real,
11 substantial party in interest.’” *Pennhurst*, 465 U.S. at 101 (citation omitted). “And,
12 as when the State itself is named as the defendant, a suit against state officials that
13 is in fact a suit against a State is barred regardless of whether it seeks damages or
14 injunctive relief.” *Id.* at 101-02. Here, any judgment entered in this challenge to
15 AB 587 would operate against the State.

16 In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court recognized a
17 limited exception to Eleventh Amendment immunity. However, the exception only
18 allows “suits for prospective declaratory and injunctive relief against state officers,
19 sued in their official capacities, to enjoin an alleged ongoing violation of *federal*
20 law.” *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th
21 Cir. 2000) (emphasis added). The *Ex parte Young* exception does apply to state-
22 law claims. *Pennhurst*, 465 U.S. at 106-107; *Doe v. Regents of Univ. of Cal.*, 891
23 F.3d 1147, 1153 (9th Cir. 2018).

24 **B. Plaintiffs’ Claim Under the California Constitution Fails for the
25 Same Reasons Their First Amendment Claim Fails.**

26 Even if the claim were not barred by the Eleventh Amendment, AB 587 does
27 not violate free speech rights under the California Constitution as a matter of law.
28 While Article I’s free speech provision is at least as broad as the comparable
provision of the federal Constitution’s First Amendment, *Beeman v. Anthem*

1 *Prescription Mgmt., LLC*, 165 Cal. Rptr. 3d 800, 821-22 (Cal. 2013), on the issue
 2 of compelled commercial disclosures the analysis and result are the same. In
 3 *Beeman*, the California Supreme Court applied California Constitution article I,
 4 section 2, to a state law requiring prescription drug claim processors to compile and
 5 disclose information on pharmacy fees. *Id.* at 804. The Court held that the statutes,
 6 which required factual disclosures about prescription drug prices, were subject to
 7 rational basis review, and that they “satisfie[d] that standard because the compelled
 8 disclosures are reasonably related to the Legislature’s legitimate objective of
 9 promoting informed decision-making about prescription drug reimbursement
 10 policies.” *Id.* Drawing on federal case law, the Court held that “[l]aws requiring a
 11 commercial speaker to make purely factual disclosures relating to its business
 12 affairs, whether to prevent deception or simply to promote informational
 13 transparency, have a purpose consistent with the reasons for according
 14 constitutional protection to commercial speech.” *Id.* at 822. The Court expressly
 15 rejected arguments that the statute forced the affected parties to support a political
 16 position adverse to their interests, because the information might be used to
 17 influence public debate on drug reimbursement rates. *Id.* at 816.

18 Here, too, the fact that the disclosures required by AB 587 might spur debate
 19 on the role social media platforms should play in moderating content does not
 20 render the disclosure requirement either subjective or controversial. The Complaint
 21 fails to state a claim under article I, section 2 of the California Constitution.

22 **VI. LEAVE TO AMEND SHOULD BE DENIED.**

23 Leave to amend need not be granted if “it is clear that the complaint could not
 24 be saved by an amendment.” *Livid Holdings Ltd.*, 416 F.3d at 946. Plaintiffs’
 25 claims fail as a matter of law, and the defects in the Complaint cannot be saved by
 26 an amendment. The Court should not grant Plaintiffs leave to amend.

27 **CONCLUSION**

28 The Court should dismiss the Complaint without leave to amend.

1 Dated: May 3, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant certifies that this brief contains 6,695 words, which:

X complies with the word limit of L.R. 11-6.1.

X complies with the page limit set by court order dated April 13, 2023.

Dated: April 18, 2023

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